THE HIGH COURT OF UTTARANCHAL AT NAINITAL

Court's order whether the case is or not approved for reporting

(Chapter VIII, Rule 32(2) (b))

Description of Case

W.P. No. 867 (M/S) of 2003, decided on 10-9-2003

Sri Jogendra Mittal Vs Addl. District Judge, Hardwar & others

A.F.R. (Approved for reporting)

~~Not approved for repor~~ting

Date Initials of Judge

10/9/2003

Note :- Bench Reader will attach this at the top of the first page of the judgment when it is put up before the Judge for signature.

HIGH COURT OF UTTARANCHAL AT NAINITAL

Writ Petition No.867 (MS) of 2003

Sri Jogendra Mittal son of Sri Hukam Chand
Mohalla Srinath Nagar, Jwalapur,
Hardwar ……. Petitioner

Versus

1. Additional District Judge, Hardwar
2. Civil Judge, Senior Division, Hardwar
3. Smt. Indira Devi w/o Sri Ram Kumar
   R/o Mohalla Srinath Nagar, Jwalapur,
   District Hardwar. …….. Respondents

Sri V.K. Kohali, Advocate for the petitioner.
Sri Lok Pal Singh, Advocate for the Respondents.

Dated: Sept. 10, 2003

Hon'ble Rajesh Tandon J:

By the present writ petition the petitioner has challenged the order passed by the Additional District Judge, Hardwar dated 22.8.2003. The revisional court by the impugned order has allowed the revision and has directed the Judge, Small Cause Court to re-hear the matter.

Brief facts giving rise to the present writ petition are that the respondent no.3 has filed a suit in the Court of Judge, Small Cause Court, stating therein that the petitioner is a tenant at the rate of Rs.225/- per month. The landlord respondent has stated that the construction work has completed in the year 1981-82 but the property was given to the tenant in the year 1982 and as such provisions of U.P. Act No. 13 of 1972 are not applicable to the property in dispute The landlord respondent alleged to have sent notice on 21.3.1988

demanding arrears of rent and also terminated the tenancy under section 106 of T.P. Act, which was duly served upon the petitioner on 22.3.1988. It was alleged by the landlord that Inspite of the fact that period of notice has expired; the petitioner has failed to vacate the premises hence the suit was filed against him.

The suit was contested by the petitioner stating therein that the provisions of U.P. Act 13 of 1972 are applicable to the premises in dispute as it was constructed in the year 1977 and the petitioner occupied the premises in the year 1978 at the rate of Rs.100/- per month. It was also stated by the petitioner that immediately after purchase of the accommodation in the year 1976 it was constructed in the year 1977 and even on 6.4.1978 the landlord was given water connection in the premises in dispute.

According to the counsel for the petitioner apart from the old construction the premises was also in occupation of another tenant before occupying the premises by the petitioner and as such the provisions of Section 20 (1)(a) of U.P. Act 13 of 1972 are applicable to the premises in question and the suit is barred by the provisions of Section 20 of Act No.13 of 1972. So far as the payment of rent is concerned it was stated that he has already paid the rent up to 13.9.78 and since then he is regularly paying the rent to the landlord and no rent is due from the petitioner. Even from 1.11.1982 he started paying the rent @ R.s100/- per month and thereafter from 1.3.1984 a sum of Rs.175/- per month was being paid as a rent.

On the pleadings of the parties the Judge, Small Cause Court has framed as many as 7 issues. Issue no.1 was to the effect as to whether Act no. 13 of 1972 is applicable to the building in dispute. While deciding issue no.1 the learned Judge was of the opinion that under the provisions of Section 2(2) of Act No.13 of 1972 since the

construction of the building shall be deemed to have been completed on the date on which the construction was reported, the learned Judge has relied upon the statement of P.W. 1 that the construction has already started in the year 1978 and the same was completed in the year 1980.

The learned Judge has also relied upon the statement of defendant that he was residing in the premises and was doing Thekedari business and as such he was never admitted tenant in 1982. Paper no. 40-C shows that water connection was given to the respondent tenant in November 1978. On the aforesaid findings Judge, Small Cause Court has come to the conclusion that the respondent was residing in the premises since 1977 and the building was completed in the year 1978 and the present suit was filed in April 1988. On the basis of findings on issue no.1 the suit was decided against the plaintiff.

So far as other findings are concerned the learned Judge has come to the conclusion that there was no default and the petitioner was paying rent @ Rs. 225/- per month and the petitioner was depositing rent under section 30 of U.P. Act 13 of 1972. It was also the case of the petitioner that a sum of Rs.1500/- was in deposit with the landlord and the petitioner was entitled for the adjustment of the same.

On the basis of the aforesaid findings the suit of the plaintiff was dismissed. Aggrieved by the aforesaid order the landlord respondent has filed a revision under section 25 of Provincial Small Cause courts Act. The revisional Court although has allowed the revision and remanded the matter to the Judge S.C.C. but at the same time has recorded a finding by setting aside the finding on issue no.1. It was stated that it was not open for the revisional Court to have

decided against the petitioner when he was remanding the case. Hence, the present writ petition has been filed.

Heard learned counsel for both the parties.

Sri Kohali has referred the case of Laxmi Kishore and another vs. Har Prasad Shukla reported in 1981 A.R.C. 545 where the Division Bench of Allahbad High Court after following the judgment of the Apex Court has recorded a finding that revisional Court has no jurisdiction to reassess or reappraise the evidence in order to determine the issues itself. The observations are quoted below:

"Considering the phrase 'according to law' occurring the first proviso to section 75 (1) of the Provincial Insolvency Act, the Supreme Court in Malini Ayyappa Naicker vs. Seth Manghraj Udhavdas firm AIR 1969 SC 1344 observed that while exercising the power, the High Court is by and large bound by the findings of the fact reached by the district Court. If the legislature intended to confer power on it to re-examine both questions of law and fact, it would have conveyed its intention by appropriate words as has been done under various other statutes. A wrong decision on facts by a competent court is also a decision according to law. The court has no power to be novo examine the findings of fact reached by the trial court. To the same effect are several decisions of this court. In Ram Narain vs. Kanhaiya Lal Vishwakarma 1965 ALJ 989, a Division Bench held that under section 25, the revisonal court is not empowered to look into the evidence of the case and to decide whether a finding of fact arrived at by the court below is justified by the evidence on record or not. Several single judge decisions, 1977 AWC 545 and 1978 AWC (J) 78 are also of the same opinion.

The question of power and procedure of courts is primarily liable to be determined by the pro9visions of the constating

instrument. The Provincial Small Causes Courts Act, 1887 constitutes small causes courts of exclusive but limited jurisdiction. The class of suits not cognisable by the courts of Small Causes is listed in the schedule appended to that Act. The procedure for trial in a Small Causes Court and the powers of the Court of Revision are given in the Code of Civil Procedure.

Section 7 of the Code of Civil Procedure gives a list of provisions which do not extend to courts constituted under the provincial small causes courts Act. It provides:

* * * * *

Orders L of the Coe excludes certain provisions of the Schedule appended to the Code of Civil Procedure from the purview of the Small Causes Courts. It provides:

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Orders XX rule 4 Civil Procedure Code provides that judgment of Small Cause Courts need not contain more than the points for determination and the decision thereon. For the regular civil courts, sub clause (2) of rule 4 aforesaid provides that judgments shall contain a concise statement of the case, the points for determination, the decision thereon and the reasons for such decision. It is evident that a judgment of a Small Causes Court need not contain a statement of the case or even the reasons for the decision on the points arising for determination.

But it is finds that a particular finding of fact is vitiated by an error of law, it has a power to pass such order as the justice of the case requires; but it has no jurisdiction to reassess or reappraise the evidence in order to determine an issue of fact for itself. If it cannot dispose of the case adequately without a findings on a particular issue of fact, it should send the case back after laying down proper

guidelines. It cannot inter into the evidence, assess it and determine an issue of fact."

The controversy which was to be decided by the Judge, S.C.C. was as to whether the building in dispute is covered under the preview of Rent Control Act or not. In the present case there is dispute with regard to the First assessment. Judge S.C.C. has found that according to the first assessment the building is out side the preview of the Act as first assessment was made in the year 1982 but at the same time Judge S.C.C. has come to the conclusion that the building was actually occupied in the year 1975. The Judge S.C.C. had recorded contradictory findings. It was, therefore, not open for the revisional Court to have confirmed the findings when the matter was being sent back to the Judge, S.C.C. as he has no jurisdiction to substitute its own findings.

In the case Helper Girdharbhai vs. Saiyed Mohmad Mirasahed Kadri and others AIR 1987 SC 1782, the Apex Court has held as under:

"This Court in the case of Bhai Chand Ratanshi vs. Laxmishanker Tribhavan (1982) 1 Ren CJ 242: (AIR 1981 S 1690) observed that where lower courts applied their minds properly in deciding a matter under S. 13(2) of the Bombay Rent Act, the High Court could not substitute its own finding for the one reached by the courts below, on a reappraisal of evidence under S. 29 (2) of the Act as substituted by the Gurjarat Act 18 of 1965. This Court reiterated that although the High Court had wider power than that which could be exercised under S. 115 of C.P.C. yet its revisional power could only be exercised for a limited purpose with a view to satisfying itself that the decision was according to law. The High Court could not

substitute its own finding for the one reached by the courts below on a reappraisal of evidence."

The revisional Court as well as the trial Court was duty bound to follow the judgment of the Apex Court report in the case Ram Saroop Rai vs. Smt. Lilawati ARC 1980 page 466. The Apex Court has observed as under:

"Unfortunately, it is not possible for the purchaser respondent or the tenant appellant to give direct testimony about the time of the construction or the nature of the construction vis a vis Explanation (b) or (c). The best testimony is the municipal record a bout the completion of the building and the verification by the municipal authorities as to whether a new construction has come into being or an old construction has been remodeled and, if so when exactly the completion took effect. The municipal assessment record produced in the court merely states 'increased assessment'. It may suggest the existence of an assessment which has been increased or it may perhaps be argued that when the building was reconstructed a new assessment was made which was morel than the previous assessment and, therefore, was described as increased assessment. The oral evidence in the case, apart from what we have set out, is inconsequential, being second hand testimony. Even the recital in the rent deed that there was a new construction in 1965-66 is by the appellant and the respondent, neither of whom has any direct knowledge about the construction. Of course, an admission by the appellant is evidence against him but an admission is not always conclusive especially in the light of the municipal records such as are available and the burden such as has been laid by the statute.

Viewed in this perspective, the failure of the trial Court specifically to record when the building was completed and what was

suit seeking recovery of possession of the building under tenancy by eviction of the tenant. The relevant portion of section 2(2) of the U.P. Urban Buildings (Regulation of Letting Rent and Eviction) Act, 1972 is to the following effect:

2. (2) (Except as provided in sub section (5) of section 12, sub section (1-A) of section 21, sub section (2) of Section 24, section 24-A, 24-B, 24-C or sub section (3) of Section 29, nothing in this act shall apply to a building during a period of ten years from the date on which its construction is completed.)

Provided……(Provided further that where construction of a building is completed on or after April 26, 1985 then the reference in this sub section to the period of ten years shall ble deemed to be a reference to a period of twenty years from the date on which its construction is completed.)

Explanation I. (For the purpose of this section):

(a) The construction of a building shall be deemed to have been completed on the date on which the completed thereof is reported to or otherwise recorded by the Local Authority having jurisdiction, and in the case or a building subject of assessment the date on which the first assessment thereof comes into effect, and where the said dates are different, the earliest of the said dates and in the absence of any such report, record or assessment the date on which it is actually occupied (not including occupation merely for the purpose of supervising the construction or guarding the building under construction) for the first time.

Provided that there may be different dates of completion of construction in respect of different parts of a building which are either designed as separate units or are occupied

separately by the landlord and on or more tenants or by different tenant;

(b) "Construction" includes any new construction in place of an existing building which has been wholly or substantially demolished.

(c) Where such substantially additional is made to an existing building that the existing building becomes only a minor part thereof the whole of the building including the existing building shall be deemed to be constructed on the date of completion of the said addition."

As will be noticed from the above, for the purposes of section 2(2) of the Act the construction of a building shall be deemed to have been completed on the date on which the completion thereof is reported to or otherwise recorded by the Local Authority having jurisdiction, and in the case of a building subject to assessment, the date on which the first assessment thereof comes into effect and where the said dates are different, earliest of the said dates. The word 'deemed' is normally used to create a statutory fiction. While interpreting a provision crating a legal fiction it has to be ascertained as to for what purpose a fiction is created and it is only after ascertaining this all the giving effect to the fiction have to be assumed. As clearly pointed out by the Apex Court in its decision in the case of Commissioner of Income Tax, Delhi vs. S. Teja Singh, reported in AIR 1959 SC 352, it is well settled that in constructing the scope of legal fiction it would be proper and even necessary to assume all those facts on which alone the fiction can operate. The Hon'ble Supreme Court in that case quoted with approval the observation of Lord Asquith in East End Dwelings Co. Ltd. vs. Finsburg Borough council 1952 AC 109, which are to the following effect:

If you are bidden to treat an imaginary state of affairs as real, you must surely6, unless prohibited from doing so also imagine as real the consequences and incidents which if the putative state of affairs had in fact existed must inevitably have flowed from or accompanied it……. The statute says that you must imagine a certain state of affairs; it does not say that having done so you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that state of affairs.

The question involved in the present case is to be determined the back ground of aforesaid position in law. The provisions contained din Section 2(2) of the U.P. Act No.13 of 1972 clearly indicate the legislative policy of allowing exemption from the restrictive provisions of the Act to all the building for specified period to be computed from the ate of the completion of their construction. Such an exemption was felt necessary in order to give incentive to appear desirous to construct new buildings. The Legislature has expressly recognised the need for encouraging the construction of new buildings by granting exemption to all such building which had not completed ten years from the completion of their construction compute din accordance with the provisions contained in the explanation to Section 2(2) of the Act."

Sri Lokpal Singh counsel for the respondent landlord has agreed that the findings of the revisional Court which has achieved finality be examined by the Judge S.C.C. after remand with regard to the first assessment.

While recording the findings the Judge, S.C.C. shall follow the principles laid down in the judgment of Apex Court with regard to fist assessment.

Both the parties have agreed that since the matter has been remanded by the revisional Court and, therefore, it will be in the interest of justice that the Judge Small Cause Court may be directed to decide such afresh in the light of the observations made above. The Judge Small Cause Court shall not be influenced by the observations of the revisional Court and shall record fresh findings with regard to the date of construction taking into consideration the provisions of section 2(2) of the Act.

The writ petition is accordingly allowed. The order passed by the revisional Court is set aside. The case is remanded to the trial Court for afresh decision in the light of the observations made above. The Judge, Small Cause Court shall decide the suit within five months from the date of filing of certified copy of this order.

(Rajesh Tandon, J.)

10.9.2003
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